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Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, THE ASSOCIATION OF FLIGHT ATTENDANTS, THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AREOSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

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STATEMENT OF INTEREST OF AMICI CURIAE

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES is the largest federal employee union representing 700,000 workers nationwide and overseas. Workers in virtually all functions of government, at every federal agency, depend upon AFGE for legal representation, legislative advocacy, technical expertise and informational services.

THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, (AFA) is a labor union which represents over 38,000 flight attendants on 27 airlines around the country. Since 1978, when Congress deregulated the airline industry, dozens of airlines have gone bankrupt or ceased operations, resulting in the loss of tens of thousands of jobs due to the economic conditions caused by deregulation. As a result, AFA's members, many of whom previously worked at airlines that are now defunct, are keenly aware of the importance of ensuring that AFA retains the right to enforce the WARN Act's protections for the benefit of its members. AFA therefore joins in the filing of this brief in support of Petitioner.

THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL was established in 1988 and is a nationwide network of 32 community-based organizations challenging deindustrialization by implementing models for local, state and federal community-responsible industrial policy. Among its member organizations are: Cleveland Coalition Against Plant Closings; Midwest Center for Labor Research of Chicago, Illinois; Seattle Workers' Center; Tennessee Industrial Renewal Network of Knoxville, Tennessee; Coalition for Economic Justice of Buffalo, New York; Tompkins/Cortland Labor Coalition of Ithaca, New York; CommonWorks of Syracuse, New York; and the Ohio Valley Industrial Renewal Project of Wheeling, West Virginia.

THE INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) is a union with 365,000 members,

a substantial portion of whom are skilled maintenance workers employed in facilities subject to the vagaries of plant shutdowns and relocations. The IUOE wishes to preserve the ability of its local unions to pursue WARN litigation on behalf of these members and therefore joins in the filing of this brief.

THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) is a labor organization of about 900,000 active members and more than 500,000 retired members. The UAW has been and continues to represent their members in litigation pursuant to the WARN Act. Accordingly, the UAW joins in the filing of this brief in support of Petitioner.

THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) is one of the largest unions in North America and represents employees in construction, manufacturing, food processing, service industries, environmental remediation, health care, federal, state and local government and the United States Postal Service. Tens of thousands of its members are employed in industries that are plagued by plant closings and layoffs. The workers LIUNA represents in low-wage industries are especially vulnerable. LIUNA maintains a continuing strong interest in representing its members in WARN Act litigation. For these reasons it joins in the filing of this brief.

THE MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE (Guild Law Center) is a national public interest litigation center that has concentrated its efforts in the area of plant closings and mass layoffs, particularly on the rights of dislocated workers through the enforcement of the WARN Act. As the national clearinghouse for all WARN Act litigation, the Guild Law Center represents hundreds of workers directly and thousands indirectly by providing technical assistance to their attorneys. The Guild Law Center thus represents the interests of WARN plaintiffs across the

country in the outcome of this proceeding, and submits this *amici curiae* brief on behalf of Petitioner.

THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAWIU) is a labor organization which represents employees throughout the country. The right of OCAWIU to file WARN claims on behalf of its members will be directly affected by the outcome of this proceeding. OCAWIU has been, and continues to represent their members in WARN Act litigation. For these reasons, the OCAWIU submits this *amici curiae* on behalf of Petitioner.

THE SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) represents over one million workers in the health care, building service, and amusement industries as well as in a variety of other industries. It also represents many workers in the public sector. Many of its members, including those who work in its health care and allied and industrial division, work for employers who are subject to WARN. Where an employer who employs SEIU members closes a plant, SEIU or one of its affiliated local unions might very well want to file suit under WARN to protect the interests of its members and the union.

THE SHEETMETAL WORKERS' INTERNATIONAL ASSOCIATION is a building and construction trade union of roughly 135,000 members. Approximately one-third of the membership works in production and fabrication shops where the greatest job loss due to plant closings occur. The union has lost approximately 2,000 members due to plant closings from 1993-1995. The union is 100 years old and has 200 locals throughout the country.

THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national, independent union comprised primarily of approximately 40,000 production and salaried workers in major manufacturing chains, and in hundreds of independent companies in the electrical manufacturing, machine-building

and plastics industries. UE also represents city, county and state public sector employees. The UE and its members have a significant interest in the rigorous enforcement of WARN due to the de-industrialization of the United States as a result of international trade agreements and other factors, which result in the shutting down of production facilities which employ UE members. UE has, and continues to represent, its members in WARN litigation. For these reasons, the UE submits this brief in support of Petitioner.

THE UNITED MINEWORKERS OF AMERICA, INTERNATIONAL UNION ("UMWA") is a labor organization headquartered in Washington, D.C. The UMWA has approximately 175,000 members in the United States, most of whom are coal miners. The UMWA and its members, as well as coal dependent communities throughout the country's coal fields, have a significant interest in the rigorous enforcement of the WARN Act due to the nature of coal as a depletable resource, thus occasioning the continuous shutdown and relocation of mining operations. The UMWA has and continues to represent their members in WARN Act litigation. Therefore, the UMWA joins in this brief in support of Petitioner.

THE UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO, CLC (UNITE), is a merger of the Amalgamated Clothing and Textile Workers Union, and the International Ladies Garment Workers' Union. UNITE is the largest union in the United States and Canada representing apparel and clothing workers. It has about 500,000 members. Garmet and textile workers are low paid and typically insensitive to their legal rights. Many are newly arrived immigrants with poor language skills. Garment and textile workers, like farm workers, are employed in a highly seasonal industry, and depend on their union to enforce their rights.

The issues presented in this case have a direct impact on the rights of the clients and members of the *amici*

herein. The decision in this case will directly affect the ability of several hundred thousand workers to effectively enforce their substantive federal rights under WARN.

SUMMARY OF ARGUMENT

This case will decide whether a labor union has standing to enforce the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-09, against an employer who had failed to provide advance notice of layoffs to either the union or the workers represented by that union. In denying standing to Local 751 of the United Food and Commercial Workers Union (UFCW), despite its conclusion that the union had alleged an injury to itself, the court below erroneously determined that "[a]n award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to the UFCW." *United Food and Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1430 (8th Cir. 1995). This determination reflected a flawed conception of the purposes of WARN, a faulty understanding of the role which monetary relief plays in furthering WARN's purposes, and the imposition of an extremely restricted view of the role that unions serve as a representative of their members' interests.

Acting upon its erroneous reading of WARN's purpose and remedies, the Eighth Circuit panel failed to give proper recognition to the Congressionally-established integral role of labor unions as integral in effectuating the purposes of WARN. *Amici* submit that the Eighth Circuit panel's constricted application of standing principles will not withstand scrutiny in the light of the structure, legislative history, and substantive legal rights of WARN.

Properly considered, labor union standing to enforce WARN falls well-within this Court's Article III standing jurisprudence, even in the absence of express Congressional authorization to unions to sue to enforce WARN.

See International Union, UAW v. Brock, 477 U.S. 274 (1986). Amici submit that the Eighth Circuit panel erred by ignoring Congress' mandate that unions, as "representatives", may sue on behalf of their members.[1] However, assuming that Congress had not included such a provision, Amici argue that the UFCW still satisfied Article III's core requirements, and the test articulated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Amici therefore fully support the arguments set forth in the UFCW's brief, but focus herein primarily upon this mistaken assumption.

At the most fundamental level, unions clearly suffer cognizable injuries to their interests when advance notice of layoffs is not provided. The Eighth Circuit panel failed to recognize that union enforcement of WARN's civil penalties acts both as punishment for the statutory violation and as a deterrent to ensure future compliance with WARN's advance notice requirements. This failure resulted in the erroneous conclusion that the union's injuries are not redressable through a suit for monetary relief on behalf of affected workers. Indeed, pursuant to WARN, that is the only possible redress. Further, this failure resulted in the erroneous conclusion that union enforcement of WARN to collect civil penalties is analogous to actions for compensatory damages, and therefore that the individual participation of union members was required. These errors led to a misapplication of standing doctrine as it has been developed by this Court.

For these reasons, *amici* join with petitioner UFCW in urging this Court to reverse the judgment dismissing this case for lack of standing.

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[1] Congress provided in WARN that: "A *person* seeking to enforce such liability, *including a representative of employees* or a unit of local government aggrieved under paragraph (1) or (3), *may sue either for such person or for other persons similarly situated, or both*, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. § 2104(a)(5).

ARGUMENT

UNIONS HAVE STANDING TO REPRESENT THEIR MEMBERS IN SUITS ENFORCING THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT.

A. Failure to Provide Advance Notice of Layoffs or Plant Closing in Compliance with WARN Harms Unions as Well as Their Members.

a. The Eighth Circuit panel erroneously assumed that in the absence of the statutory provision allowing a union to sue as the "representative" of dislocated workers, 29 U.S.C. § 2104(a)(5), that the UFCW could not satisfy Article III association standing principles. In fact, the opposite is true: A lawfully recognized union may assert its bargaining unit members' WARN claims so long as the Article III "case or controversy" requirement is met.

The touchstone here is that the injury is direct, and its nature precise. Significantly, this case satisfies the heart of Article III; namely, the requirement that the association's members suffer a "distinct and palpable injury." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Further, the union's interests are protected by WARN, making the UFCW a "litigant entitled to have the court decide the merits of the dispute." *Warth*, 422 U.S. at 498. Indeed, the lower court's approach is contrary to this Court's charge that "standing is gauged by the specific common-law, statutory, or constitutional claims that a party presents." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The sine qua non of standing jurisprudence is that the entity seeking standing first possess a legally enforceable right. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983) ("[i]n each case [a union's] injury must be analyzed to determine whether it is of the type that the [ ] statute was intended to forestall."); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-8 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). This Court has also looked at the directness or indirectness of the asserted injury. *Associated Gen.*, 459 U.S. at 540.

Where a statute is silent as to whom an appropriate litigant should be, this Court has permitted representation in accordance with standards established under common law or statutes of general application. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (third party representation permissible where the standards under the common law are satisfied); 13 C. Wright, A. Miller, *Federal Practice and Procedure* § 3531.9 at 627 (West 1984) (formal representative such as trustees, guardians and personal representatives may protect the interests of those they represent).

b. "The actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" *Warth*, 422 U.S. at 500. The right possessed here, is at its heart, one which lies in the federal statutorily established role of unions as the exclusive representative of workers under the National Labor Relations Act. 29 U.S.C. § 151 (1995); See also 29 U.S.C. §§ 157 and 159 (1995); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).[2] When a union sues to redress a violation of WARN, it acts as the representative of the employees' own choosing for the "purpose of . . . other mutual aid and protection." 29 U.S.C. §§ 151 and 157 (1995). Indeed, protection and enforcement of employees' rights is a union's raison d'etre.

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[2] This fact distinguishes unions as appropriate litigants under WARN from other associations. *See Warth*, 422 U.S. 490.

A union's advocacy for and enforcement of workplace rights is at the core of national policy. As this Court has stated:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wage, hours, and working conditions . . . "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); See 29 U.S.C. § 151 (1995); *See also Office and Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 67 (D.C. Cir. 1992) (R.B. Ginsburg, J.) ("The Union is no mere volunteer whose representation of others must be checked for adequacy. The labor union has already been certified by a neutral government agency as the "exclusive representative" of the bargaining unit employees.")

In enacting WARN, Congress created workplace rights and a means for enforcement of those rights that are akin to those sought or obtained in collective bargaining. It therefore harmonized its statutory role for union representation as the key means for enforcing WARN rights of the employees in bargaining units in which a union has been recognized with those rights employees have pursuant to the National Labor Relations Act. Other than the fact that WARN rights arise from statute, rather than from a collective bargaining negotiation, they are virtually identical in kind to a lay-off notice, or severance agreement, that might be negotiated or enforced in the ordinary course by a union.[3] Suing to obtain monetary

[3] In this regard, the lower courts' attempt to distinguish this Court's holding in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) is telling. The Eighth Circuit opinion found a controlling distinction between an action to seek monetary relief under a collective bargaining agreement, as permitted under *Hoosier Cardinal*, and an action for monetary relief under WARN, as in this case. 50 F.3d at 1430 n.5. Yet the cognizable legal injuries arising from an employer's violation of a collective bargaining agreement, the type of proof needed, and the type of remedy typically sought, are indistinguishable from the same issues arising from a statutory violation.

relief under WARN, therefore, is well within the "other mutual aid and protection" that Congress long ago declared to be a union's proper and lawful activity." 29 U.S.C. § 157 (1995).

c. The Eighth Circuit panel's decision created an artificial gap between the rights of individual union members and those of the union itself.[4] This view rested upon a mistaken view of the rights asserted, which are fundamentally collective in nature.[5] *See Brock*, 477 U.S. at 290;[6] see Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 Mich. L Rev. 733 (1988).

[4] *See Telecommunications Research and Action Center v. Allnet Communication Serv., Inc.*, 806 F.2d 1093 (D.C. Cir. 1986) ("Here the union and its members are in every practical sense identical; the union "is but the medium through which individual members seek to make more effective the expression of their own views.") *Id.* at 1096.

[5] This is evident in WARN's threshold requirements which establish that a violation occurs only where an employer has more than 100 employees and chooses to layoff more than a third of them in a single facility with more than 50 employees. 29 U.S.C. § 2101 (1995). It is thus only when the collective rights of a fairly large group are affected that WARN applies. These numerical requirements are consistent with the genesis of WARN as part of a larger statutory scheme which included worker adjustment provisions. See pp. 12-14.

[6] This Court stated: "[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. 'The only practical judicial policy when people pool their capital, their interests, or their activities under

Virtually all terms and conditions of employment are a product of collective negotiation, and the union is not only the authorized representative of bargaining unit employees in dealing with their employer, it is the exclusive representative. 29 U.S.C. § 159. Where a union has been recognized it alone has the "power to order the relations of employees with their employer . . . ." *Allis-Chalmers*, 388 U.S. at 181. When the employer fails to meet its obligations the union is damaged along with the individuals in its bargaining unit, and that damage can only be remedied by providing the bargaining unit members with the remedy to which they are entitled.

d. This unity of interests between the union and the bargaining unit employees is underscored by the legislative history of WARN. Even though the paramount purpose of WARN is to provide advance notice of employment losses to unions, workers, and their state and local governments, 29 U.S.C. § 2102 (1995), 20 C.F.R. § 639.1 (1995), the Eighth Circuit panel evidently viewed WARN as an individual notice statute, and ignored the union's place within the worker adjustment statutory scheme which Congress has fashioned.

WARN had its genesis in the Omnibus Trade and Competitiveness Act of 1988, which included both advance notice and worker adjustment provisions. *H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1045* (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 2078. While dividing the worker adjustment provisions from those concerning advance notice in the pending trade bill, the "Conferees reaffirm[ed] that advance notice is an essential component of a successful worker readjustment program, and [that] they regard[ed] the two subtitles as closely interrelated." *Id.*[7]

a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'" *Brock*, 477 U.S. at 290 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951)).

Given its central role in worker readjustment, it is then clear why Section 3 of the statute provided:

> [a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . to each representative of the affected workers . . . or, if there is no such representative . . . to each affected employee; and . . . to the State dislocated worker unit . . . and chief elected official of the unit of local government within which such closing or layoff is to occur.

29 U.S.C. § 2102(a). Thus, WARN required employers to provide advance notice of economic dislocations to unions, not to individual employees. It is only where individual workers are not represented by unions that notice is given directly to them. Appropriate state and local government officials are notified as well.

The principal rationale for WARN's advance notice requirement was to provide time for the affected government units and unions to assist workers with readjustment assistance and reemployment. The main vehicle by which

[7] WARN became freestanding legislation when the trade legislation was vetoed, largely because of Presidential objections to the inclusion of advance notice requirements in the legislation. *See* President's Veto Message, 24 Weekly Comp. Pres. Doc. 655-57 (May 24, 1988). WARN was reintroduced as S. 2527 and passed both houses of the Congress with margins sufficient to survive a veto. 134 Cong. Rec. S. 8868-69 (1988); 134 Cong. Rec. H5519-5520 (1988). WARN was then allowed to become law without the President's signature. Pub. L. No. 100-379, 102 Stat. 890 (1988); Presidential Statement on the Worker Adjustment and Retraining Notification Act, 24 Weekly Comp. Pres. Doc. 990 (August 2, 1988). The sponsors of S. 2527 explicitly noted the relevance of the conference report on H.R. 3 in interpreting WARN. *See* 134 Cong. Rec. S8692 (1988) (statements of Sen. Durenberg and Sen. Metzenbaum); 134 Cong. Rec. H5504-5505 (1988) (statements of Rep. Jeffords and Rep. Clay).

this was to be accomplished was through the previously-linked Economic Dislocation and Worker Adjustment Assistance (EDWAA) Act, 29 U.S.C. §§ 1651-1662b, which passed the Congress as part of the omnibus trade legislation. *Pub. L. No. 100-418, 102 Stat. 1524 (1988).* EDWAA provided adjustment services to dislocated workers by linking state dislocated worker units, local governments, and unions and employers, and Congress designated unions as central to effectuate the full panoply of adjustment activities for their members.[8]

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[8] EDWAA provided for local coordination of dislocated worker assistance primarily through substate grantees, 29 U.S.C. § 1661a(b), working in conjunction with a state job training coordinating council, 29 U.S.C. § 1661f, and state dislocated worker units with rapid response capability, 29 U.S.C. §§ 1661b(b) and 1661c(b). Labor unions were ensured a role in the local coordination of job training and adjustment services through membership on each local Private Industry Council, 29 U.S.C. § 1512(a)(2), as well as membership on the state job training coordinating council, 29 U.S.C. § 1532(a)(3)(C). *See* H.R. Rep. No. 285, 100th Cong., 1st Sess. (1987), *reprinted in* House Subcommittee on Labor-Management Relations, Committee on Education and Labor, 101st Cong., 2d Sess., Legislative History of S. 2527 at 583 *et seq.* (Comm. Print 1990). *See also,* U.S. Department of Labor, Economic Adjustment and Worker Dislocation In A Competitive Society: Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation 22-23 (1986) and U.S. Congress, Office of Technology Assessment, Plant Closing: Advance Notice and Rapid Response 5 (1986).

In addition to adjustment assistance under EDWAA, during the interim between the provision of advance notice and the loss of employment, there is an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322, or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C. § 2331. Congress guaranteed labor unions a role under both laws: Labor unions may file petitions for certifications of eligibility on behalf of represented workers under the Trade Adjustment Assistance program. 19 U.S.C. § 2271(a). Unions likewise have a statutory role as petitioners under the NAFTA Transitional Adjustment Assistance program. 19 U.S.C. § 2331(b)(1).

e. Against this backdrop, it is evident that WARN is simply not an individual notice statute and that unions themselves are damaged when they do not receive notice. First and foremost, advance notice permits unions to more effectively exercise their right to represent their members through collective bargaining about the plant closing decision and its effects. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-2 (1981); Otis Elevator Co., 269 NLRB 891 (1984), *enforced in part sub nom. United Food and Commercial Workers Int'l Union, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. 1993), *cert. dismissed*, 114 S.Ct. 2157 (1994).

Next, advance notice to the union permits the union to assist its members in seeking new employment, replacement income, and adjustment services. This assistance to members enables the union to fulfill its responsibilities to advance its members economic interests, and, in turn, creates goodwill on the part of the union's members directed toward the assisting union. This goodwill translates to improved future organizing opportunities with those members in their new workplaces as well as enhanced community standing for the union. When a union fails to assist its members, the union's capacity to act as an effective advocate for its members is weakened. *See OPEIU, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992).

Finally, advance notice may permit the union, the local community, or the employees to arrange for new ownership or an employee buy-out of the facility providing notice, an opportunity which is foreclosed when the closing or mass layoff is a *fait accompli* at the time the announcement is made. First Nat'l Maintenance, 452 U.S. 680, 681 ("[B]argaining over the effects of a decision [to close a particular facility] must be conducted in a meaningful manner and at a meaningful time."). Continuing the business enterprise necessarily assists the union itself, as well as the employees and their community. Further, local or district unions may reside within a geo-

graphical area that includes opportunities for employment so that a union, when given advance notice, can assist workers soon to lose their jobs to find new work at another plant.

In short, the pursuit of a WARN lawsuit advances cognizable interests of both a union and its members by advancing the members' interest in "mutual aid or protection." Thus, the question of whether UFCW members would themselves have standing to redress the same injury relied on in their behalf, which is the first prerequisite under *Hunt*, 432 U.S. at 343, is inseparable from the UFCW's own interests, and should be answered in the affirmative. For this reason, the alleged lack of proper statutory notice in this case clearly injured the UFCW as well as its members, and satisfied Article III's core requirements.[9]

B. Individual Participation of the UFCW Members Is Not Required by the Rights Asserted nor the Relief Requested.

1. *WARN Civil Penalties Are Primarily Intended to Enforce Compliance with Its Advance Notice Provisions, Not to Compensate Individuals Deprived of Notice.*

a. Even had Congress not authorized unions to sue, the UFCW still satisfied the third prong of the standing test promulgated in *Hunt*; namely, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343.

[9] This fact distinguishes this case from *Associated General Contractors*, wherein this Court would not allow a union to pursue treble damages in an action brought under the Clayton Act. 15 U.S.C. § 15. In *Associated General*, this Court noted that the union failed to allege any direct injury, such as the termination of the collective bargaining agreement, a diminishing share of the contracting market controlled by union firms, or declining membership or revenues. 459 U.S. at 542. In the case of a plant closing, a union suffers all of these direct injuries.

This requirement is not a prerequisite to satisfaction of the Article III "case or controversy" requirement, as opposed to "other limits on the class of persons who may invoke the courts' decisional and remedial powers." *Warth*, 422 U.S. at 499. The Eighth Circuit panel, however, expanded the "required participation" requirement well beyond the sort of considerations which this Court has utilized.

These have included concerns that the claim is fundamentally of an individual nature, *see Harris v. McRae*, 448 U.S. 297, 321 (1980) ("the participation of individual members . . . is essential to a proper understanding and resolution of their free exercise claims"), or that it raises concerns for judicial manageability, *Warth*, 422 U.S. at 515 (recognizing that a damages award would be proper if "common to the entire membership").

b. Since all UFCW bargaining unit members who experienced dislocation or termination without proper notice shared the experience in common, with variance only with respect to the actual date of separation, there is no concern similar to that present in *Harris*. A court could easily grasp the issues and facts involved without individual participation. The Eighth Circuit's principal concern, then must have turned on the question of judicial manageability. A fundamental confusion on the part of the Eighth Circuit panel arose primarily from its faulty understanding of the purpose of WARN's civil penalty provisions and the role of individual affected workers in obtaining the monetary relief provided by those penalties. Again, the lower court acted in apparent ignorance of WARN's enforcement scheme, treating WARN's civil penalties as solely equivalent to individual damage awards designed only to compensate individual workers deprived of prior notice of dislocation. This is made clear in footnote 7 of the opinion and its accompanying text, where the court views WARN's civil penalties as necessarily linked to either the members' monetary claims or the UFCW's own monetary loss. 50 F.3d at 1431. WARN

monetary relief, however, is not tied to specific actual monetary losses of an employee, but rather to the length of the employer's statutory violation. Further, this Court's standing cases have never limited cognizable injuries to interests protected by damages measured in strictly monetary terms. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230-31 n.4 (1986); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n.20 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

In fact, Congress intended that WARN's penalty provisions deter employers from failing to provide advance notice of employment losses in order to further compliance with the overall worker adjustment goals of WARN and its related legislation. Rather than compensatory damages measured exclusively in terms of lost wages, WARN's monetary relief provisions most closely resemble civil penalties intended to ensure compliance with WARN, without respect to any monetary loss on the part of the affected workers.[10]

Contrary to the approach taken by the court below, the structure of WARN's civil penalties and its legislative history make it clear that WARN was intended to provide advance notice to workers prior to mass layoffs and plant closings, not as a severance pay scheme providing damage awards for individual workers. The developments in WARN's history demonstrate that Congress' purpose in adopting WARN's penalty provisions went well beyond compensation of workers for lost wages:

First, during the Senate debates on S. 2527 an amendment was offered to permit employers to make severance payments in lieu of advance notice.[11] The principal Sen-

[10] For example, if an employer unlawfully closed a workplace without any prior notice, and all affected employees obtained new work at higher pay the next day, WARN would still provide a monetary remedy.

[11] The so-called Quayle amendment offered employers the options of providing "severance pay in lieu of notice." 134 Cong. Rec. S8541 (1988).

ate sponsor of WARN opposed the amendment, and stated:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers. This is not the object of this bill. The object of this bill is to give employees notice so that they can be involved in retraining and readjustment.

134 Cong. Rec. S8542 (1988) (remarks of Sen. Metzenbaum). Congress rejected the proposed amendment,[12] which evidenced an intent to accomplish more through WARN than simply providing affected workers deprived of advance notice with penalties providing up to sixty days' back pay.

Second, the language of WARN's penalty provisions arose in its predecessor bill, S.538, which was later added as an amendment to the trade legislation by the Senate.[13] The Senate committee summarized the bill's penalty provisions and their intent:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusions of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions (sic), designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987), *reprinted in* Legislative History of S. 2527, *supra* n.3 at 742.

[12] 134 Cong. Rec. S8547 (1988).

[13] 133 Cong. Rec. S9492-9494 (1987).

This legislative history, as well as the overall structure of WARN's penalty provisions, manifests the error of treating WARN's civil penalties as equivalent to individual damage awards to affected workers. While Congress adopted a private enforcement scheme as a means to enforce WARN, it did so with its advance notice ends in mind, not in an effort to provide damage awards to individual affected workers. For this reason, the essential feature of WARN's civil penalties was compliance and deterrence, not compensation.

b. The distinction between compliance and compensation is by no means trivial. First of all, the lower court's restrictive understanding of the role played by monetary relief in WARN enforcement undergirds its determination that monetary relief for affected workers would not redress the injuries inflicted upon the UFCW by the lack of advance notice. 50 F.3d at 1430. Instead, an anomalous result of the decision below is to effectively prohibit unions from obtaining redress for themselves or its members as a result of an employer's failure to comply with the notice requirements. As the Eighth Circuit panel itself admitted, it would have denied a request for injunctive relief because the statute precludes federal courts from enjoining a plant closing or mass layoff. 29 U.S.C. § 2104(b) 1995 ("[I]t is doubtful that injunctive relief would have been forthcoming even if it had been sought."). 50 F.3d at 1431 n.6. Yet nothing in the legislative history suggests that Congress intended to grant a right of notice to unions but then deny unions any method of redress. Indeed, as discussed above, such a conclusion is completely contrary to the purpose of the statute.

Second, this restrictive understanding divorced WARN from its central role in Congress' worker adjustment scheme, and undergirds its determination that the individual participation of UFCW members was required. Viewed in proper context, WARN's civil penalties were intended to encourage employer compliance with the statute's advance notice requirements—including its role for unions in adjustment assistance and retraining.

Accordingly, any monetary relief obtained by unions for affected members promotes the advance notice goals of WARN and its attendant advantages to unions since it penalizes the particular employer who violates the advance notice requirement, and encourages that employer and others to comply with WARN in the future. For this reason, individual participation of union members is not necessary, and monetary relief to affected members in a suit prosecuted by the union clearly redresses the injury suffered by the union *and* its members.

2. *Union Representation of Its Members in WARN Actions Does Not Present Concerns of Judicial Manageability.*

a. Another confusion on the part of the Eighth Circuit panel arose from its faulty understanding of the practicalities of determining the amount of monetary relief in any one case. Individual participation is not essential to give effect to the monetary calculation because the calculation, contrary to the lower court's characterization, is simple, requiring only the date of each employee's separation, the rate of pay, and the amount of any offsets available to the employer. These matters are known to the employer, and the union, and no individual member testimony is required or relevant to that determination.[14] There is no need to inquire, as in cases involving severance pay, whether severance occurred by way of firing for cause, furlough, reduction in force, or termination. Thus, like *Brock*, questions regarding the monetary calculation for each individual do not require judicial inquiry. 477 U.S. at 286. *See Carpenters Dist. Council v. Dillard Dep't.*

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[14] A parallel distinction is made under Rule 23 of the Federal Rules of Civil Procedure. There, of course, a Rule 23(b)(2) class may be utilized to obtain equitable relief, including back pay, without prior written notice to class members. In contrast, cases seeking damage awards must proceed under Rule 23(b)(3), with individualized notice to class members and an opportunity to opt out of the class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Stores, 790 F. Supp. 663 (E.D. La. 1992), *amended*, 7 I.E.R. Cases 799 (E.D. La. 1992), *aff'd in part and rev'd in part, remanded*, 15 F.3d 1275 (5th Cir. 1994), cert. denied, 115 S.Ct. 933 (1995). Further, the civil penalties are not speculative or large, as in a case like *Associated General Contractors*, 459 U.S. at 542-546.

Indeed, the common issues involved in litigating a WARN case far outweigh those with individualized elements. In addition to employer liability, the maximum duration of the penalty period involved, the type and value of fringe benefits included in the calculation of back pay, and the offsets, if any, available to the employer are common to all claims. Each of these matters is likewise feasibly determined without individual member participation, and these determinations present no unusual case management challenges.

The relative simplicity of the damage computations ensures that the UFCW "can litigate this case without the participation of those individual claimants and still ensure that 'the remedy, if granted will inure to the benefit of those members of the association actually injured.'" *Warth*, 422 U.S. at 515.

b. The second of the considerations with respect to the relative ease of case manageability is that litigation of this case by the union as plaintiff does not differ greatly from litigation of the case as a class action brought by individually affected workers. Anomalously, under the Eighth Circuit's holding, such a lawsuit could proceed on behalf of similarly situated workers while a virtually identical lawsuit by the union on behalf of its members would be dismissed for lack of standing.

However, in terms of judicial economy, the use of union plaintiffs offers distinct advantages, whether compared to a class action by individuals, or a number of separate lawsuits filed to remedy the same WARN violation. *See Brock*, 477 U.S. at 289 (1986) ("While a class action creates an ad hoc union of injured plaintiffs . . .

[a union] suing to vindicate the rights of its members can draw upon a preexisting reservoir of expertise and capital."). Unions usually have greater familiarity with the employer, the collective bargaining agreement, and the history and background of the workplace than individual workers or plaintiff attorneys. Union staff are available to assess a variety of relevant questions, including possible defenses under the unforeseen business circumstances and faltering company exceptions to WARN liability, 29 U.S.C. §§ 2102(b)(1) and (2)(A), and the good faith defense, all of which can become quite complex.[15] Moreover, unions possess an institutional interest in specific geographical areas which means that they may be better suited to act as plaintiffs than individuals who may be forced to move away in search of employment. Not insignificantly, from the perspective of the aggrieved employees, a union plaintiff offers numerous advantages, including free legal representation and assistance with the costs of litigation. *See Brock*, 477 U.S. at 289.

For these and similar reasons, a union plaintiff will often be in a position to prosecute a WARN suit more expeditiously than parties or attorneys less familiar with the situation. Indeed there has been relatively little litigation under this law, as the General Accounting Office found, due in part to the difficulty in finding experienced attorneys. GAO, *Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting its Goals*, 23-24 (1993). Further, if each worker who is

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[15] See *International Bhd. of Teamsters, Local 952 v. American Delivery Serv. Co.*, 50 F.3d 770 (9th Cir. 1995); *Carpenters Dist. Council v. Dillard Dep't Stores*, 778 F. Supp. 297 (E.D. La. 1991), *aff'd*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 933 (1995); *Jurcev v. Central Community Hospital*, 7 F.3d 618 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1830 (1994); *Chestnut v. Stone Forest Indus.*, 817 F. Supp. 932 (N.D. Fla. 1993); *Frymire v. Ampex Corp.*, 61 F.3d 757 (6th Cir. 1995); *Jones v. Kayser-Roth Hosiery*, 748 F. Supp. 1276 (E.D. Tenn. 1990); *Washington v. Aircap Indust.*, 860 F. Supp. 307 (D.S.C. 1994); *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Servs.*, 826 F. Supp. 326 (C.D. Cal. 1993).

laid off or suffers termination brings a separate claim, then the courts will be clogged with multiple lawsuits arising out of the same set of circumstances. If several individuals join together and retain a single attorney, or the claim is brought as a class action, then there has been the de facto creation of a quasi-union, although one presumably without the same legal resources and expertise in workplace-related issues. This effectively denies workers many of the most significant advantages of union membership. See 29 U.S.C. §§ 151, 157 (1995).

CONCLUSION

The decision below rested upon a fundamental misconception of the role of labor unions in this country, creating an artificial gap between the interests of workers and unions, and one which stands in contrast to national labor policy as codified in our federal laws. WARN is, in the final analysis a statute designed to protect collective interests. Violations of that law are redressable through the civil penalties created by Congress.

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